

SOAH DOCKET NO. 582-10-1868
TCEQ DOCKET NO. 2009-1865-UCR

APPLICATION OF EAST	§	BEFORE THE STATE OFFICE
CEDAR CREEK FRESH WATER	§	
SUPPLY DISTRICT, CERTI-	§	
FICATE OF CONVENIENCE	§	
AND NECESSITY (CCN) NO.	§	
11682, TO ACQUIRE	§	
FACILITIES AND TRANSFER A	§	OF
PORTION OF CCN NO. 11206	§	
FROM THE CITY OF MABANK	§	
AND TO AMEND ITS CCN NO.	§	
11682, LOCATED IN	§	
HENDERSON COUNTY	§	ADMINISTRATIVE HEARINGS

EAST CEDAR CREEK FRESH WATER SUPPLY DISTRICT'S REPLIES TO EXCEPTIONS OF GUN BARREL CITY

COMES NOW, East Cedar Creek Fresh Water Supply District (ECCFWSD), co-applicant in the above-referenced Water Code Section 13.301 sale-transfer-merger (STM) application, and files its Replies to the Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) filed by the City of Gun Barrel City (GBC).

1. NOT A CCN APPLICATION

This docket involves the transfer of a portion of the City of Mabank's water CCN to ECCFWSD pursuant to Texas Water Code §13.301. Mabank, a general law city, intends to sell a portion of its public water system (PWS) to ECCFWSD, a municipal utility district. Since the area served by these facilities is certificated to

Mabank, the TCEQ must transfer that CCN to ECCFWSD before the district may sell potable water there.

The Legislature has established a very specific procedure and set of evaluation criteria to be followed by the TCEQ in dealing with a CCN transfer in cases like this. While some of the criteria to be evaluated are also applied when granting a new or amending an existing CCN, this is not a CCN application. Throughout this case, GBC has lost sight of this fact. In its exceptions, GBC repeatedly challenges the PFD because it claims ECCFWSD and Mabank did not present information required under Rule 291.105 – *Contents of Certificate of Convenience and Necessity Applications*. Admittedly, ECCFWSD and Mabank did not follow the strict requirements of Rule 291.105 because that rule does not apply. This application is controlled by Rule 291.109 – *Report of Sale, Merger, Etc.; Investigation: Disallowance of Transaction*. GBC's exceptions are specious and without merit.

2. CAPACITY RULES AS WRITTEN CONTROL

GBC goes to great length to claim that ECCFWSD does not and will not have enough treated water capacity to serve its existing customers and the transferred Mabank customers. These claims are all predicated on the testimony of GBC's two consulting engineers that the TCEQ's default water capacity rules is .6 gallons per minute per connection. However, the TCEQ can and does give

exceptions to this capacity rule under Rule 29045(g). Both ECCFWSD and Mabank have been granted such exceptions. GBC acknowledges these exceptions but claims that exceptions are not in the public interest under the CCN rules. GBC then goes through convoluted calculations to show why ECCFWSD will theoretically not have enough water to serve its customers.

In its zeal to champion the .6 gpm default capacity rule, GBC ignores the TCEQ's rules on capacity exceptions and when they can be revoked. Rule 290.45(g)(6) provides:

(6) Any alternative capacity requirement granted under this subsection is subject to review and revocation or revision by the executive director. If permission to use an alternative capacity requirement is revoked, the public water system must meet the applicable minimum capacity requirements of this section.

(A) The following conditions, if attributable to the alternative capacity requirements, may constitute grounds for revocation or revision of established alternative capacity requirements or for denial of new requests, if the condition occurred within the last 36 months:

(i) documented pressure below 35 psi at any time not related to line repair, except during fire fighting when it cannot be less than 20 psi;

(ii) water outages due to high water usage;

(iii) mandatory water rationing due to high customer demand or overtaxed water production or supply facilities;

(iv) failure to meet a minimum capacity requirement or an established alternative capacity requirement;

(v) changes in water supply conditions or usage patterns which create a potential threat to public health; or

(vi) any other condition where the executive director finds that the alternative capacity requirement has compromised the public health or resulted in a degradation of service or water quality.

There is no evidence in this record that any of these conditions has or is likely to occur if the Mabank customers are transferred to ECCFWSD. GBC merely points out that, by its calculations, select components of ECCFWSD's water system will fall within the 85% rule of Water Code 13.139(d). As the PFD found, the 85% rule is only a reporting requirement, not an inflexible capacity standard.

GBC claims that ECCFWSD will not have enough water to serve the transferred area because portions of the district's water treatment plant are being refurbished. For some unexplained reason, GBC continually ignores the fact that Mabank will sell ECCFWSD wholesale water for these new customers as needed for the first year after the transfer. If these customers are receiving enough water now, they will continue to do so. In the meanwhile, ECCFWSD will be diligently completing its treatment plant construction. Any notices required under the 85% rule in the interim will be given.

3. LOCAL REGULATION OF WATER SUPPLIES FOR FIRE FLOWS NOT AN STM ISSUE

GBC challenges the PFD claiming it does not recognize the authority of a local municipality to regulate water supplies in the interest of public safety. Specifically, GBC complains that ECCFWSD will not provide fire flows inside its city unless GBC pays for that service.

First, fire flows are not a requirement of public drinking water service with one single exception. The Legislature has mandated that public water suppliers do not have to provide fire hydrants or fire flows unless they serve residential area inside municipalities with a population of 1 million or more.¹ GBC does not fall within this population group.

Second, the issue between GBC and ECCFWSD is who will pay to install and maintain fire fighting facilities inside the City. GBC claims that the public interest and its power to set building codes requires the district to bear this burden. However, GBC does not cite any statutes to support its arguments. In counterpoint, ECCFWSD relies on Water Code §49.212 which allows districts to impose charges for plant and services. There is no provision in the Texas Constitution, the Local Government Code or the Water Code that relieves a municipal from the responsibility to pay another governmental entity for services or facilities that the other governmental entity builds and operates for the municipality's benefit. There is no provision in the Texas Constitution, the Local Government Code or the Water Code that requires a municipal water district to provide free water service inside a city.

4. ECCFWSD HAS THE NECESSARY FINANCIAL RESOURCES

The three key issues in a CCN transfer application is whether the transferee has the financial, managerial and technical (FMT) resources to provide continuous

¹ Health and Safety Code §341.0358

and adequate service after the transfer. GBC claims that ECCFWSD does not have the financial resources to fix its own plant and extend service to the current Mabank service area. GBC ignores ECCFWSD \$1 million cash reserves as irrelevant. GBC ignored the uncontroverted record evidence that ECCFWSD has excellent credit and ready access to bond markets so it can obtain any needed capital improvement funds. Like any publically-owned water utility, ECCFWSD may adjust its rates as needed to raise funds for capital improvements or additional debt service. GBC's claims that ECCFWSD failed to prove its financial resources is predicated on the CCN application requirements of Rule 291.105. As noted above, this rule does not apply in this case. The PFD correctly finds that ECCFWSD has adequate financial resources under the applicable STM criteria.

5. PRECLUSION OF GBC ACQUISITION NOT AN ISSUE

GBC challenges the PFD because it does not recognize GBC's "right" to acquire the system. GBC has never identified the legal authorities giving it this "right." In any event, such a "right" is irrelevant to this case. This is an STM application which looks solely at the service abilities of the parties to the transaction in question. The ability, now or in the future, of a municipality to acquire the utility facilities in question is not a timely issue ripe for litigation at this time because it is mere speculation whether such an acquisition may ever be attempted. If GBC ever wants to buy the water system inside its corporate limits, it must make an

offer to purchase and deal with any state or federal impediments to the sale that exist at that time. GBC has never done this.

6. SUMMARY

GBC has not identified any material defects in the PFD regarding the law and the facts that control this docket. Judge Smith has prepared a thorough and insightful PFD. Her proposed order should be adopted without material change after correction of those few minor errors identified in ECCFWSD's Exceptions.

Respectfully submitted,

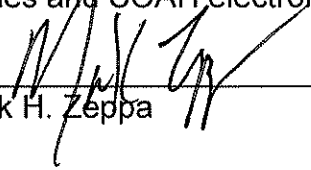
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CERTIFICATE OF SERVICE

I, Mark Zeppa, certify that the foregoing pleading was efiled and served on all parties and SOAH electronically on December 29, 2010.



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